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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1[redacted] 1949

No. 145

BAXTER CREEK IRRIGATION DISTRICT, and W. COBURN COOK, Trustee for the Creditors of Baxter Creek Irrigation District,

Petitioners,

vs.

STATE OF CALIFORNIA, FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

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STATE OF CALIFORNIA, FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA,

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PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals

for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment (R. 62) of the United States Court of Appeals for the Ninth Circuit made in the above-entitled cause on November 16, 1948, which dismissed the appeal from the District Court of the United States for the Northern District of California, Northern Division.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioners took an appeal from the District Court to the United States Court of Appeals for the Ninth Circuit in this bankruptcy matter (R. 49). Respondents moved to dismiss the appeal "on the ground that said appeal was not taken within the time provided by law." (R. 59.) The Court below ordered the appeal dismissed. (R. 61, 62.) Petition for a rehearing was denied by the Court below on April 5, 1949. (R. 70.)

Petitioners maintain that the notice of appeal was filed in time but that the Court below failed to compute the time properly under the applicable statute.

The statute here involved covering bankruptcy matters, 11 U. S. C. A., Sec. 48a, reads as follows:

> "Appeals under this title to the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District

of Columbia shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry."

The significant dates are as follows:

July 9, 1948—Order complained of entered in Civil Docket of District Court (R. 47);

July 22, 1948—Respondents herein served on Petitioners written notice of the order (R. 48);

July 23, 1948—Respondents filed proof of service of said notice (R. 48);

August 19, 1948—Petitioners filed Notice of Appeal in the District Court (R. 49).

Thus it will be seen that petitioners filed the Notice of Appeal (August 19) within thirty days from the date written notice of the entry of the order was served (July 22) and said proof of service was properly filed within five days after service (July 23). (R. 48.) However, it will also be observed that the Notice of Appeal was filed forty-one days after entry of the order.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. 1254 (1). Jurisdiction also exists to allow certiorari in bankruptcy matters such as this under 11 U.S.C.A., Section 47 (c).

OPINION BELOW.

The opinion below was filed November 16, 1948, and reads:

> "The appeal is ordered dismissed. Siegel v. Margiotta, 102 F. 2d 525, 526 (Cir. 2)." (R. 61.)

It is reported in 170 F. 2d 1021.

QUESTION PRESENTED.

Under 11 U.S.C.A. 48a, is a notice of appeal filed in time when it is filed within thirty days after service of written notice of the entry of judgment, although said time of filing is forty-one days from the date of entry of judgment?

REASONS FOR GRANTING THE WRIT.

Certiorari is sought in this case because the Court of Appeals for the Ninth Circuit has rendered a decision on an important question of federal procedure which has not been, but should be, settled by this Court. The existence of doubt as to the meaning of a statute regulating the time for an appeal should not be allowed to persist.

Wherefore, petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Ninth Circuit to certify and send to this Court for its review and determination a full and complete transcript of the record of the proceedings in said

Court in the case numbered and entitled in its docket as No. 12,032, Baxter Creek Irrigation District, and W. Coburn Cook, Trustee for the Creditors of Baxter Creek Irrigation District, Appellants; vs. State of California, Fish and Game Commission of the State of California, Appellee, and that the judgment of said Court be reversed, and said Court by this Court be directed to consider and determine said appeal, and for such other relief as to this Court may seem proper.

Dated, Turlock, California,
June 20, 1949.

BAXTER CREEK IRRIGATION DISTRICT,
and W. COBURN COOK, Trustee for
the Creditors of Baxter Creek
Irrigation District,
Petitioners.

W. COBURN COOK,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing petition for a writ of certiorari is well founded and that it is not interposed for delay.

Dated, Turlock, California,
June 20, 1949.

W. COBURN COOK,
Counsel for Petitioners.

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BAXTER CREEK IRRIGATION DISTRICT, and W. COBURN COOK, Trustee for the Creditors of Baxter Creek Irrigation District,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

The Court of Appeals entered judgment dismissing the appeal from the District Court on November 16, 1948. (R. 62.) The opinion was filed on November 16, 1948, and is reported in 170 F. 2d 1021. (R. 61.) On April 5, 1949, the Court of Appeals made an order denying petition for rehearing. (R. 70.)

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. Section 1254 (1) and 11 U.S.C.A. Section 47 (c).

STATEMENT OF FACTS.

Respondents herein filed a Petition for Order to Show Cause in the District Court in a bankruptcy case (R. 2); petitioners herein appeared in opposition to the Show Cause Order. (R. 8.) On July 9, 1948, the District Court rendered its Memorandum and Order. (R. 45-47.) On July 22, 1948, respondents served petitioners with Notice of Entry of Memorandum and Order. (R. 48.) On July 23, 1948, proof of service of the Notice was filed by respondents. (R. 48.) The Notice of Appeal was filed by petitioners on August 19, 1948. (R. 49.)

The statute here involved is 11 U.S.C.A. 48a which reads as follows:

> "Appeals under this title to the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry."

SPECIFICATION OF ERRORS.

Although the Court below gave no reason for its decision other than quoting a single case in its opinion (R. 61), it must have construed the statute to mean that a maximum of forty days is allowed in which to file a notice of appeal regardless of whether or not a notice of entry of judgment is served and filed. It is submitted that the Court of Appeals was in error when it dismissed the appeal on this ground, the only one raised by the motion to dismiss.

ARGUMENT.

If litigants strictly comply with the logical and literal wording of a statute governing the time for taking an appeal as petitioners have done here, we respectfully maintain that a Court should not order the appeal dismissed by disregarding the plain wording of the statute and thus deny them a hearing on the merits.

An examination of the dates given above shows that petitioners filed the notice of appeal "within thirty days after written notice * * * of the entry of judgment".

The only case found which deals with this statute under the particular circumstances as here is *Siegel v. Margiotta,* 102 F. (2d) 525. That case was the only authority given by the Court of Appeals in its one sentence opinion. (R. 61.) In that case the Court held that an appellant had only forty days within

which to take an appeal regardless of the fact that a notice of entry of the judgment was served and filed. The Court refused to read the statute in the alternative and said: "Literally, the words can certainly be so read, but the results are then quite absurd. For example, if the appellee waits more than forty days to serve the order so that time to appeal has already expired, service will revive the right."

Of course, once the time for appeal has expired, nothing the parties can do will revive that right. In the present case, only thirteen days had passed when respondents served the notice of entry of judgment on petitioners. As the statute very clearly states that petitioners have thirty days from that time in which to file the notice of appeal, petitioners believe that any other construction as applied to the facts of this case would be erroneous.

There is nothing strange or unusual in having the time for appeal run from the service of notice. 4 C.J.S. Appeal and Error, Sec. 439 reads:

> "The time of commencement of the period of limitation designated for taking and perfecting an appeal or proceeding in error is dependent upon the terms of the applicable statute or rule of the court, varying as between the different jurisdictions, and in some instances *even in the same jurisdiction* with reference to different proceedings, judgments, or decrees. Among the various times when such time is deemed to start running are a number which are common or typical, for instance the rendition or entry of the final judgment or of the particular judgment, order or decree appealed from, * * * the end of

the term at which the judgment, order or decree is rendered or made, * * * and *service of a notice or a copy of the judgment, order or decree from which review or appeal is sought,* * * *" (Emphasis added.)

In *Siegel v. Margiotta,* supra, the Court appeared to resent any change in the method of computing the time for taking an appeal. It stated:

"We think the meaning is reasonably plain. It has always been the uniform custom in federal courts, so far as we know, to make the time to appeal begin with the entry of the judgment, not with its service upon the putative appellant; that the New Rules of Civil Procedure * * * have not changed. The Chandler Act has preserved that custom, though it has lengthened the former time by ten days."

Actually several instances can be found where Congress has provided the time for appeal shall run from the time of service rather than the time of entry:

Packers and Stockyards Act, 7 U.S.C.A. 194 (a) "within thirty days after service";

Federal Trade Commission, 15 U.S.C.A. Sec. 45 (c), "within sixty days from the date of the service of such order * * *"

In petitioners' home state of California the Code of Civil Procedure provides in Section 974:

"Any party dissatisfied with the judgment rendered in a civil action in a police or justice's court, may appeal therefrom to the superior court of the county, at any time within thirty days after notice of the rendition of the judgment."

Thus it will be seen that there is ample precedent for 11 U.S.C.A. 48a[1] providing that the time to appeal runs from the time of service of notice of entry of judgment. It is submitted that a Court should not do violence to the plain wording of a statute in order to further its notion of a "uniform custom" which does not in fact exist.

Petitioners have sought certiorari here because only this Court can settle this procedural question and remove the trap which now exists for any appellant who takes an appeal under the Bankruptcy Act. If the decisions in *Siegel v. Margiotta,* supra, and the present

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[1]In 4 C.J.S. Appeal and Error, Sections 445, 446, 447 and 448, can be found discussions of four statutory methods of computing the time for taking an appeal:

1. From Rendition or Entry of Judgment, Order or Decree;
2. From End of Term;
3. From Service of Notice or Copy of Judgment, Order, or Decree;
4. From Settlement of Case.

11 U.S.C.A. 48a is a combination of the first and third methods. That there is nothing unusual for a jurisdiction to adopt the third method will be noted from the many states cited in the notes under 4 C.J.S. Appeal and Error, Section 447, which include California, Louisiana, Maryland, Minnesota, New York, North Dakota, Pennsylvania, South Carolina, South Dakota, and Utah.

4 C.J.S. p. 919 footnote 53 illustrates the rule in New York:

"Under Civ. Prac. Act § 612, amended by L. (1921) c 372, the time within which a party may appeal begins to run from the day on which the record shows he had knowledge of the adverse order or judgment, whether by service on him of a copy thereof with notice of entry, or because the record shows that appellant in fact filed or entered the order, so that the fact that the clerk had entered an order denying plaintiff's motion for judgment would not start running of limitations, where the record was silent as to who entered the order and the time for appeal was properly computed from plaintiff's notice of entry and service of copy of order. —Corporation of Frederick Scholes v. Theodore Ficke Warehouses, 198 N.Y.S. 47, 204 App. Div. 329."

case are to stand, then cautious litigants who are trained to follow a statute exactly in taking an appeal may likewise find that their appeal will be dismissed and receive no hearing on the merits.

In *Reconstruction Finance Corporation v. Prudence Securities Advisory Group,* 311 U. S. 579, 582, 61 S. Ct. 331, 333, this Court in deciding a question concerning the procedure in taking an appeal under the Chandler Act stated: "Ambiguities in statutory language should not be resolved so as to imperil a substantial right which has been granted." This Court also thought that "considerations of liberality and leniency" should be applied in construing the time for appeal in *Union National Bank v. Lamb,* ..... U.S. ....., 69 S. Ct. 911 (Opinion delivered May 16, 1949), and held that the appeal did not fail for lack of timeliness.

We do not believe that litigants should be obliged to look up the legislative and judicial history of a statute which is plain and reasonable on its face to determine the simple matter of how many days they have in which to take an appeal. If we should assume that Congress did not mean what it said, then the Statute should be changed. But such change should be accomplished by legislative action so that all reading the statute may know, rather than by judicial decision.

CONCLUSION.

It is submitted that a writ of certiorari should be issued to the United States Court of Appeals for the Ninth Circuit in this case, that the judgment of said Court be reversed, and said Court by this Court be directed to consider and determine said appeal.

Dated, Turlock, California,
June 20, 1949.

W. COBURN COOK,
Counsel for Petitioners.

Office - Supreme Court, U.
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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATE OF CALIFORNIA, FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioners seek to have the Court grant a Writ of Certiorari to review the Order of the United States Court of Appeals for the Ninth Circuit dismissing petitioners' appeal to the Circuit Court. The Order of the District Court from which the appeal was sought to be taken was entered July 9, 1948. Notice

of entry of the District Court's Order was served on petitioners by respondent July 22, 1948 and proof of service of the Notice was filed July 23, 1948. The Notice of Appeal was not filed by petitioners until August 19, 1948.

The Motion to dismiss the appeal which was granted by the United States Court of Appeals for the Ninth Circuit was made on the ground that the Notice of Appeal was not filed within forty days of the entry of the Order of the District Court from which the appeal was sought to be taken and that this was the maximum time within which an appeal could be taken in Bankruptcy matters. Petitioners opposed the Motion on the ground that the Notice of Appeal was timely since it had been filed within 30 days of Respondent's Notice of Entry of the District Court's Order.

The sole question for review is whether Section 25a of the Bankruptcy Act (11 U.S.C.A. 48a) fixes a maximum time of forty days after the entry of the Order complained of within which to file a notice of appeal.

Petitioners' argument to the contrary is based on the contention that the Act by its terms fixes the time to appeal as thirty days after notice whenever notice of entry of the Order complained of is served on appellant and proof of such service filed within five days after service.

The same contention was advanced by the appellant in the Court of Appeals for the Second Circuit in

Siegel v. Margiotta, 102 F. (2d) 525. As observed by the Court in that case, acceptance of petitioners' contention would mean that "if the appellee waits more than forty days to serve the Order so that the time to appeal has already expired, service will revive the right."

Counsel for petitioners in the Brief in Support of the Petition for Writ of Certiorari, page 10, admits that such a result would be absurd and agrees that once the time for appeal has expired, nothing the parties can do will revive that right. He fails to designate, however, any part of the statute that would make any distinction between acts of the parties done within forty days of entry of the order and acts done after forty days of such entry.

It would indeed be strange if notice to petitioners would give them longer time to take their appeal than they had without it. The purpose of the Section, as stated in *Siegel v. Margiotta,* was "probably to promote notice of entry to the other side; such a construction would make it unlikely; unless it were made within ten days."

Petitioners' reference to statutes providing for the running of the time of appeal from the time of serving notice is not helpful. The question whether the statute fixes a maximum time of appeal apart from such notice is not involved in those statutes. As stated in *Collier Bankruptcy Manual,* Section 25.01, page 354, under the Bankruptcy Act the *maximum* appeal time is forty days but "by serving notice himself

upon his adversary, the successful party may shorten the appeal time, but in no case more than ten days."

There is no conflict in the Circuit Courts of Appeal on this question. The conclusion of the Court of Appeals for the Second Circuit in *Siegel v. Margiotta, supra,* was followed by the Court of Appeals for the Ninth Circuit in this case. (170 F. (2d) 1021.)

By *per curiam* decisions of two Circuits, Section 25a of the Bankruptcy Act has been construed as fixing a maximum appeal time of forty days. Respondent submits that this is the only reasonable construction that can be given this Section and that the Petition for Writ of Certiorari should be denied.

Dated, Oroville, California,
July 27, 1949.

Respectfully submitted,
FRED N. HOWSER,
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